(3) Mutual mistake. (i) Concerning mutual mistake and its effect on the terms of the jural act, it is necessary at the outset to exclude two questions which do not involve the present principle. In the first place, the question what sort of mistake — including individual mistake — will suffice *to bar a bill for specific performance* is a distinct one; it involves merely the choice of remedies, not the terms of the valid act. In the next place, the question whether an act may be avoided for a *mistaken assumption of fact external to the contract*, is a distinct one; belonging to the principle of avoidability [see ss 20, 21, 22 Contract Act].

Mr Cheo also cited *Olympia Sauna Shipping Co SA* v *Shinwa Kaiun Kaisha Ltd*[13] which held that, unless a party is able to show a mistake common to both parties, the court will not order any rectification of an agreement between the parties and, in the case of a unilateral mistake, the court held that no rectification will be ordered unless the party seeking the rectification satisfy certain stringent conditions which are:

(a) that party seeking rectification must show that he mistakenly believed the written instrument to be an accurate expression of their bargain with the non-mistaken party when in truth it was not;
(b) the non-mistaken party had actual knowledge of the mistaken party's mistake at the time the agreement was made;
(c) the non-mistaken party's conduct must be shown to be unconscionable so as to lead equity to intervene.

On this point of mutual mistake, I find that the allegations in the relevant paragraphs of the affidavit of Eric Trimble do not show that the mistaken assumption of Diversey was communicated to the plaintiffs or that the plaintiffs shared their view. Having regard to the evidence in the said affidavit of Eric Trimble and the authorities cited above, I concluded that this is not a proper case for this court to give the directions sought by counsel for Diversey for the rectification of the agreement on the ground of mistake.

Accordingly, for the reasons given above, I made the following declarations on 26 February 1991:

(a) that upon a true construction of the agreement Diversey are not entitled to claim from the plaintiffs the professional fees paid by Diversey to Messrs Coopers & Lybrand and CTS with regard to the Action; and
(b) that the defendants are not entitled to claim party and party costs in respect of items 639 and 641 of the defendants' Bill of Costs No 572/90 filed with regard to Suit No 5626 of 1986.

I also awarded the plaintiffs the costs of this application.

Order accordingly.

Solicitors: *Shook Lin & Bok; Allen & Gledhill.*

Reported by *Rosalind Tan*

Teng Meow Chong v Chia Ngim Fong & Anor

HIGH COURT (SINGAPORE) — MOTION IN SUIT NO 1277 OF 1990
THEAN J
25 APRIL 1991

Unincorporated Associations — Registration of business — Whether there has been change in constitution of business or management thereof — No report to registrar — Whether an infringement of Business Registration Act (Cap 32, 1985 Ed) — Business Registration Act (Cap 32, 1985 Ed), ss 12 & 17(1)

Civil Procedure — Injunction — Infringement of statute — Whether court can grant injunctive relief to enforce such arrangement pending trial — Equity cannot assist

The first and second defendants as husband and wife had, prior to 1980, been carrying on the business of a department store under the name and style of 747 Departmental Store at Block 12, Haig Road, #01-327, Singapore 1543. The business was not successful and having incurred considerable debts, negotiations were entered into between the plaintiff and the defendants with a view to the plaintiff taking over the business. A contract dated 20 February 1980 was entered into between the plaintiff and the first defendant to the effect that the plaintiff would settle the outstanding debts and take over payment of the rental and PUB charges in respect of the premises in return for use of the premises, free from interference, to conduct business under the name of 747 Departmental Store. No return was filed with the Registry of Businesses reflecting the arrangement entered into and the business continued to be registered solely in the name of the first defendant.

This arrangement continued for ten years until the first defendant notified the plaintiff in January 1990 or thereabouts of his intention to terminate it. This was objected to by the plaintiff and a dispute arose. The first defendant proceeded to terminate the registration of the business on 8 February 1990, and, on 27 March 1990 the defendants registered a new business under the name and style of 747 Lucky Store at the same premises.

The defendants locked up the premises preventing the plaintiff from carrying on business. The plaintiff obtained an ex parte injunction restraining the defendants from 'locking, padlocking, welding or otherwise obstructing the carrying on of the business at Block 12, Haig Road, #01-327, Singapore 1543 and parting with, selling, charging or in any way disposing of the goods and merchandise stored at the said premises' and applied to have the injunction continued. The defendants took out a notice of motion seeking an interlocutory injunction restraining the plaintiff from entering and continuing in occupation of the premises.

Held, refusing the plaintiff's motion for continuation of the ex parte injunction and granting the defendants' motion:

(1) The nature and effect of the arrangement between the plaintiff and the first defendant could be construed either as one under which the plaintiff became the manager of the business while the proprietary interest in the business remained vested in the first defendant, or, alternatively as one whereby the plaintiff became de facto the sole proprietor of the business taking it over entirely from the first defendant. On either view of the transaction, there was an infringement of the provisions of the Business Registration Act (Cap 32, 1985 Ed) ('the Act').

(2) By s 17(1) of the Act, a person in default, ie one who does not have a valid certificate of registration or who has not furnished changes required under s 12 of the Act, cannot sue to enforce any contract in relation to the business entered into while he is in default. The agreement or arrangement which the plaintiff seeks to enforce by the continuation of the ex parte injunction is clearly one in relation to the business, and on either view of the arrangement, the plaintiff is in default. The plaintiff falls squarely within s 17(1) of the Act.

(3) Even if s 17(1) of the Act was not applicable, equity would not assist the plaintiff. Equity cannot assist a party who has been in breach and still continues to be in breach of the law. He who comes into equity must come with clean hands. The plaintiff was an experienced and successful businessmen who had the benefit of legal advice. The inference is that he was aware of the requirements of the Act but did not comply with them.

(4) The plaintiff was aware that the first defendant had terminated the registration of the business of 747 Departmental Store and yet the plaintiff took no steps to register the business under that or any other name. To continue the ex parte injunction would be to enable the plaintiff to proceed to carry on a business without complying with the requirements of the Act; it would be tantamount to giving approval to a continuing breach of the Act. This the court cannot do.

(5) The defendants were entitled, in the circumstances, to the relief sought by them with its operation suspended for 14 days so as to enable the plaintiff within that period to enter and remove all his goods from the premises.

Case referred to

1 *Suntoso Jacob* v *Kong Miao Ming* [1986] 2 MLJ 170 (folld)

Legislation referred to

Business Registration Act (Cap 32, 1985 Ed) ss 2(1), 6, 12(1), 17(1)

Lim Kim Hong for the plaintiff.

Philip Jeyaretnam (*Wilson Tan* with him) for the defendants.

Cur Adv Vult

Thean J: There were two motions before me: one was by the plaintiff for an order that the injunction granted ex parte on 21 August 1990 against the defendants whereby they were restrained from 'locking, padlocking, welding or otherwise obstructing the carrying on of the business at Block 12, Haig Road, #01-327, Singapore 1543 and parting with, selling, charging or in any way disposing of the goods and merchandise stored at the said premises' be continued until after the delivery of judgment in this action or further order, and the other was by the defendants also for an interlocutory order, namely, that the plaintiff 'be restrained from entering, remaining on or continuing in occupation of the premises, Block 12, Haig Road #01-327, Singapore 1543'. Both the motions were heard together as they turned on the same facts. At the conclusion of the hearing, I dismissed the motion by the plaintiff and discharged the ex parte injunction granted to him; I allowed the motion of the defendants and granted the interlocutory injunction until trial or until further order.

The relevant facts that led to the motions before me were as follows. The defendants are husband and wife. For some time, prior to 1980, the first defendant had been carrying on the business of a department store under the name and style of 747 Departmental Store at Block 12, Haig Road, #01-327, Singapore 1543 ('the said premises'). The business was registered with the Registry of Businesses on 22 September 1977 with the first defendant as the sole proprietor of the business and also the manager thereof. It appeared that the business was not successful, and the first defendant incurred a considerable amount of debts which he could not discharge. Early in 1980 or thereabouts, negotiations between the plaintiff and the defendants took place with the view to the plaintiff taking over the entire business from the first defendant. These negotiations came to fruition, and a rather unusual document was executed between the plaintiff and the first defendant on 20 February 1980, the terms of which are as follows:

> Re: 747 Departmental Store at 327 Haig Road Singapore
>
> Teng Meow Chong and Chia Ngim Fong hereby agree as follows:
>
> (1) Teng Meow Chong shall pay the monthly rent of $400 in respect of premises known as 327 Haig Road, Singapore on behalf of 747 Departmental Store.
>
> (2) Teng Meow Chong shall also pay the PUB charges.
>
> (3) In consideration of the above and also of the fact that Teng Meow Chong has helped to settle Chia Ngim Fong's debts Chia Ngim Fong agrees to permit Teng Meow Chong to make use of the said premises to conduct his business under the name of 747 Departmental Store or any other case and shall not do anything whatsoever to prevent Teng Meow Chong from so doing business at the premises.
>
> Dated this 20th day of February 1980.
>
> sgd
> Chia Ngim Fong
>
> sgd
> Teng Meow Chong
>
> sgd
> Sim Mong Soo
> Advocates & Solicitor
> Singapore

Concurrently with the execution of that document, a power of attorney bearing the same date was also executed by the first defendant appointing the plaintiff as the attorney and conferring on him, among other things, the powers to manage and carry on the business of 747 Departmental Store and to operate the bank account opened in the name of that business. It was expressly provided by this power of attorney that it should be 'irrevocable for a period of twenty years'. The plaintiff said that in addition to paying the rent to the first defendant for the said premises, the utility charges and the costs and expenses for operating the business and paying off the debts of the first defendant, he agreed to employ the second defendant and pay to the first defendant a bonus annually based on the profits earned from

the business. It appeared that the second defendant was so employed and the first defendant was so paid a bonus annually.

It is far from clear what precisely was the arrangement intended by the plaintiff and the first defendant. It seems to me that the parties intended that the plaintiff should at his own costs and expenses take over and operate the business of 747 Departmental Store as his own business, though in name as the manager of the first defendant. The plaintiff said that by that arrangement, he had a joint venture with the defendants but he did not say what sort of joint venture it was — whether it was a partnership or otherwise. Whatever it might be, it is clear to me that the plaintiff had by the arrangement made with the first defendant acquired a beneficial interest in the business. Notwithstanding this arrangement, no return was filed with the Registry of Businesses by either the plaintiff or the first defendant reporting a change either in the constitution or the management of the business or in any other way reflecting the arrangement they had entered into. The business continued to be registered solely in the name of the first defendant as the sole proprietor and also the manager thereof.

Pursuant to that arrangement, the plaintiff took over and carried on the business of 747 Departmental Store at the said premises and continued to do so for a period of approximately ten years. In January 1990 or thereabouts, the first defendant notified him of the former's intention to terminate the arrangement they had made. This was naturally objected to by the plaintiff and a dispute thenceforth arose between them. The first defendant, as the sole proprietor of the business, terminated the registration of the business on 8 February 1990, and on 27 March 1990, he and the second defendant both registered with the Registry of Businesses a new business under the name and style of 747 Lucky Store, and that business was said to be carried on at the said premises. The defendants obviously intended to carry on the new business at the same premises at which the plaintiff was then carrying on the business of 747 Departmental Store. The plaintiff complained that in August 1990 the defendants abruptly locked up the said premises and prevented the plaintiff from carrying on the business. He thereupon instituted this action against both the defendants. The plaintiff claimed that the arrangement which he had made with the first defendant was for a duration of 20 years and this was evidenced by the power of attorney which the first defendant had executed, and that the first defendant in breach of this arrangement terminated the arrangement. He therefore claimed damages for breach of contract and also specific performance of the arrangement. On 21 August 1990, he obtained an ex parte injunction in terms as I have earlier set out, and subsequently took out a notice of motion for its continuation.

The defendants disputed the claim of the plaintiff. According to the defendants, no specific duration of the arrangement was agreed; however, it was understood by the plaintiff and the defendants that the plaintiff would remain on the said premises and manage the business for only a period of ten years, and this was so notwithstanding that the power of attorney was expressed to be irrevocable for a period of 20 years. On 7 September 1990, the defendants having been served with the ex parte injunction in turn took out a notice of motion seeking an interlocutory injunction restraining the plaintiff from entering and continuing in occupation of the said premises.

When the motions came on for hearing before me, I raised three issues for counsel to consider and respond. First, pursuant to the arrangement made between the plaintiff and the first defendant (which was not in dispute) the plaintiff had been carrying on the business of 747 Departmental Store at the said premises and no change in the registration of this business had been reported to the Registrar of Businesses — whether such change be one in respect of the constitution of the business or the management thereof — and in these circumstances whether there had been an infringement or contravention of the Business Registration Act (Cap 32, 1985 Ed) ('the Act'). Secondly, if there had been such infringement or contravention of the Acts should the court grant relief by way of injunction to enforce such an arrangement pending the trial of the action? Thirdly, since February 1990, the registration of the business of 747 Departmental Store had been terminated, and in view of that, should the court grant an injunction to enable the plaintiff to carry on a business which is not registered under the Act? As counsel were not prepared to argue on these issues fully, I invited them to put in written submissions which they did subsequently.

On the first issue, it seems to me that there are two views one can take on the nature and effect of the arrangement made between the plaintiff and the first defendant. First, the arrangement may be construed as one under which the plaintiff became the manager of the first defendant's business of 747 Departmental Store at the said premises with extensive authority, and the proprietary interest in the business remained vested in the first defendant. Secondly, it may be construed as an arrangement whereby the plaintiff became *de facto* the sole proprietor of the business, taking it over entirely from the first defendant. On the first view, the plaintiff became a person responsible for the management of the business within the meaning of s 2(1) of the Act, and

under s 6 of the Act, among other things, the name and other particulars of the person responsible for the management of the business are required to be registered with the Registry of Businesses. Prior to the arrangement the first defendant was the person responsible for the management of the business, and this was registered with the Registry of Businesses. Hence, when the arrangement was entered into there was a change in the particulars registered with the Registry of Businesses, and under s 12(1) of the Act, the plaintiff was required to register this change with the Registry of Businesses within 14 days after the change had taken place. On the second view, there was a change in the ownership or constitution of the business and a fortiori there was a change in the particulars registered with the Registry of Businesses. Again, under s 12(1) of the Act, this change was required to be registered within 14 days after the change had taken place. Therefore, on either view of the transaction there was an infringement of the provisions of the Act.

On the second issue, the position is very clear. By s 17 of the Act, a person in default, ie a person who does not have a valid certificate of registration or who has not furnished changes required under s 12 of the Act, cannot sue to enforce any contract in relation to the business entered into while he is in default. Section 17 provides as follows:

> (1) Where a person required to be registered under this Act —
>
> (a) carries on business without a valid certificate of registration; or
>
> (b) fails to furnish any information required under section 12, then the rights of the defaulter under or arising out of any contract, in relation to the business carried on by the defaulter in respect of which no valid certificate of registration is in force or there is non-compliance with section 12, made or entered into by or on behalf of the defaulter at any time while he is in default shall, subject to subsection (2), not be enforceable by action or other legal proceedings either in the business name or otherwise.

The agreement or arrangement which the plaintiff seeks to enforce by seeking a continuation of the ex parte injunction is clearly one in relation to the business. On either view of the transaction the plaintiff had been in default in complying with the requirements of the Act since the date of the arrangement and was still in default. It seems to me he fell squarely within this provision.

Even if that section is not applicable, there is still a difficulty in the way of the plaintiff. Equity cannot assist a party who has been in breach and still continues to be in breach of the law. In seeking the assistance of the court to grant him an injunction he must come with clean hands: he who comes into equity must come with clean hands. Plainly on his past and present conduct the plaintiff has failed to satisfy the test required of him: see *Suntoso Jacob* v *Kong Miao Ming*[1] at p 175. This is far from being a case where a person was wholly ignorant of the requirements of registration of business under the Act. The plaintiff is an experienced and successful businessman and at the time when the arrangement with the first defendant was entered into he had the benefit of legal advice. That unusual document and the power of attorney were prepared by his solicitor. The inference is that he was aware of the requirements of the Act — he must have been advised of such requirements — but for some reasons which I need not speculate he did not comply with such requirements. He must therefore accept the consequence.

I now turn to the last issue. The first defendant on 8 February 1990 terminated the registration of the business of 747 Departmental Store, and that was the business which was carried on by the plaintiff. The plaintiff was aware of this, and once again had not taken steps to seek to register the business under that or other name. Here again he had the benefit of legal advice. If the ex parte injunction were continued, it would enable the plaintiff to continue to carry on a business without complying with the requirements of the Act; it would be tantamount to giving approval to a continuing breach or contravention of the Act on the part of the plaintiff. That clearly the court cannot do.

I therefore refused the motion to continue the ex parte injunction granted to the plaintiff. If there had been compliance with the Act by the plaintiff, the answer might well have been different.

I now turn to the motion by the defendants for an interlocutory injunction. The defendants are the tenants of the said premises and also the second floor; they and their children live on the second floor. They rent the same from the Housing & Development Board. The first defendant had terminated the arrangement made with the plaintiff and whether the termination was a breach of contract or not is an issue to be tried. In the meanwhile, certain interim order ought in the circumstances to be made. There was evidence that before the ex parte injunction was obtained by the plaintiff, the defendants had locked up the said premises and the plaintiff had sought by force to enter the said premises and police assistance was called. It seems to me that the question of who is entitled to occupy the said premises should not be left at large until trial, as the dispute may deteriorate to one involving the use of force. Having regard to all the circumstances, I was of the opinion, and am still of that opinion, that the interlocutory injunction asked for by the defendants ought to be granted, and, accordingly, I granted it. However, I suspended

the operation for 14 days so as to enable the plaintiff within that period to enter the premises and remove all his goods and other properties.

As regards the question of costs, I considered that in the circumstances neither of the parties deserved any costs. In particular, I refused costs to the defendants on both the motions. Principally they succeeded on the points raised by me.

Order accordingly.

Solicitors: *Hoh & Mas; Robert WH Wang & Woo.*

Reported by *Olivia Menon*

Frans Furniture Pte Ltd v Good Property Land Development Pte Ltd

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 1037 OF 1989
CHUA J
18 APRIL 1991

Land Law — Agreement for sale and purchase of land — Construction of condition 7 of The (Revised) Singapore Conditions of Sale — Vendor sent late notice to complete — Vendor included claim for compensation for increase in area of premises in completion account — Vendor's claim for compensation for increase in area of premises disputed by purchaser who claimed liquidated damages for late completion delayed by vendor's wilful default

Land Law — Completion account — Function — Whether vendors' failure to provide revised completion account a sufficient reason for plaintiffs not to complete the sale

Words and Phrases — 'Contumacious' — The (Revised) Singapore Conditions of Sale, condition 7

Words and Phrases — 'Wilful default' — The (Revised) Singapore Conditions of Sale, condition 7

The plaintiffs and the defendants entered into an agreement ('the agreement') under which the defendants agreed to sell to the plaintiffs a piece of property ('the property'). The sale was subject to the terms and conditions in The (Revised) Singapore Conditions of Sale. Clause 13(1) of the agreement provided that completion was to take place 14 days after receipt by the purchaser of the vendor's notice to complete and cl 13(2) provided that such notice to complete be given by the vendor on or before 31 December 1988.

The defendants did not issue a notice to complete until 3 March 1989. Accompanying the notice to complete was a completion account pursuant to which the defendants made a claim for $160,547.10 representing an increase in the floor area of the property of 3.278% over the original area. The plaintiffs maintained that the defendants were not entitled to compensation for the increase in floor area. On 26 December 1989, the sale and purchase of the property was completed without payment of the defendants' claim for the additional sum of $160,547.10.

The action concerned the plaintiffs' claim against the defendants for interest for late completion under condition 7 of The (Revised) Conditions of Sale and the defendants were counterclaiming against the plaintiffs for interest on the late completion.

Condition 7 provided that if from any cause whatever (other than the wilful default of the vendor) the purchase shall not be completed on the day fixed on completion, the purchaser shall pay the vendor interest for late completion and also the purchaser shall not be entitled to any compensation for the vendor's delay unless contumacious.

Held, dismissing the plaintiffs' claim and allowing the defendants' counterclaim:

(1) There should not be any difference in meaning between the words 'contumacious' and 'wilful default' in condition 7. The purchaser will only be relieved from payment of interest under condition 7 if he can show (a) that the vendors had been in default; (b) that such default was wilful; and (c) that the wilful default was the direct cause of the delay in completion.

(2) Clause 13(1) of the agreement does not specifically provide that the notice to complete should be accompanied by a completion account. The function of a completion account is to inform the purchaser of the amount due from him on completion. There is no fundamental principle that if the vendor fails to give a completion account to the purchaser, the purchaser would be under no obligation to complete on the day fixed on completion.

(3) It appeared from the correspondence between the parties that it was the defendants who were insisting on the plaintiffs completing the sale and purchase, while the plaintiffs were insisting that the defendants submit a revised completion account. The plaintiffs had been given a completion account and the plaintiffs could not say that they did not know the amount payable on completion as the sums claimed by the defendants were known to the plaintiffs.

(4) As regards the plaintiffs' claim for liquidated damages, it was clear that the defendants by failing to give the notice to complete by 1 December 1988 was liable for liquidated damages under cl 13(2) of the agreement. However, the defendants had told the plaintiffs that they could deduct the amount from the completion account. As regards the defendants' claim for the increase in floor area, the plaintiffs could have paid the amount claimed to their own or the defendants' solicitors to be held as stakeholders pending the decision of the court and tendered to the defendants the remainder of the purchase moneys. Alternatively, the plaintiffs could under condition 8 of The (Revised) Singapore Conditions of Sale deposit the remainder of the purchase moneys in a bank and give written notice thereof to the defendants. Thus the plaintiffs were able to comply with cl 13(1) of the agreement and complete the sale and purchase within 14 days of the defendants' notice to complete. The absence of a revised completion account was not a sufficient reason for not completing the sale. As such, the delay in completion was attributable solely to the default of the plaintiffs and they had to pay the defendants interest for the late completion. If the plaintiffs had tendered the remainder of the purchase moneys or deposited them in a bank under condition 8 and the defendants had failed to complete, then the defendants would have been responsible for the delay.

Case referred to

1 *Toh Teck Sun* v *Mandarin Gardens Pte Ltd* [1988] 2 MLJ 276 (folld)